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No. 77-1622

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALVIN H. WRIGHT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-29) is reported at 568 F. 2d 153. The opinion of the district court (Pet. App. A-31 to A-36) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1977. A petition for rehearing was denied on February 15, 1978. The petition for a writ of certiorari was filed on May 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's findings that the United States was negligent in the design and construction of a bridge and road project were clearly erroneous.

2. Whether Utah's acceptance and maintenance of the bridge and approach roads relieved the United States of liability under Utah law.

3. Whether the discretionary function exception to the Federal Tort Claims Act barred federal liability for the decision to build a bridge that would not withstand an extraordinary flood.

STATEMENT

In the early 1960s the State of Utah began planning the construction of a bridge over McElmo Creek in San Juan County, Utah. The bridge was part of a plan to build a highway on the Indian reservation situated in San Juan County (Pet. App. A-2). Because of the lack of available state funds, the state highway department requested the Bureau of Indian Affairs to help with the project. In 1964, using the state's design for the bridge[1] and its own design for the approach roads,[2] the Bureau began construction of the bridge and roads. The state highway department, however, exercised ultimate control over the location and placement of the bridge and approaches. The state incorporated the bridge and approach roads into the state highway system and assumed the full responsibility for maintaining them (*ibid.*).

On September 4 and 5, 1970, five years after completion of the project, a rainstorm of record proportions caused severe flooding that washed away portions of the approach roads to the bridge.[3] On the

[1]The state of Utah designed the bridge to withstand a flood of a magnitude that was estimated would occur once every 25 years (Pet. App. A-5).

[2]The Utah Highway Department approved the plans for the approach road (Pet. App. A-2).

[3]The storm caused a water flow that would normally occur only once every 42 to 55 years (Pet. App. A-6 to A-7).

evening of September 5, 1970, Richard and Nancy Fellars were drowned when the car they were driving over the washed-out portion of the road went out of control and plunged into the rain-swollen McElmo Creek. Their son Marcus, who was with them at the time of the accident, was rescued from the creek and suffered minor bruises (Pet. App. A-33 to A-34).

Petitioners, the executor of the estates of Richard and Nancy Fellars and the guardians of their children, brought this action against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2674. Petitioners charged that the United States had negligently designed, located, constructed, inspected and maintained the bridge and approach roads, and that such negligence was the proximate cause of the Fellars' death and the child's injuries.

Following a non-jury trial, the district court found that the United States had negligently designed and constructed the bridge and approach roads "without adequate or reasonable concern for the hazards that would be created during floods" (Pet. App. A-32), and that the negligence of the United States was the proximate cause of the deaths of the Fellars and the injuries to their son (*id.* at A-34). The court concluded that a "prudent engineer in constructing the bridge and approaches * * * would have been on reasonable notice of the prospect of a flood of the character of the one in question" (*id.* at A-33) and would have designed the project to withstand such a flood.

The court of appeals reversed, holding that the district court "was clearly erroneous in finding the United States negligent" (Pet. App. A-5). The court of appeals noted undisputed testimony not only that Utah had ultimate responsibility for the design of the McElmo Creek bridge,

but also that the State exercised ultimate control over the placement and location of the bridge. The court concluded that because Utah was not negligent in designing the bridge in the manner it did (*id.* at A-7), the United States could not be faulted either for using the State's design or for placing the bridge at the location that Utah directed. Similarly, since the design and location of the bridge dictated the location of the approach roads, the court held that the United States could not be found negligent in the design or construction of those roads, especially because the state approved the plans for the approaches and the roads' design and because construction met applicable federal requirements (*id.* at A-8).

Furthermore, the court of appeals pointed out that, under state law, a contractor is not liable for injuries caused by his fulfillment of plans, specifications and directions given to him by an employer, where such plans are "not so obviously dangerous that no reasonable man would follow them" (Pet. App. A-9). See *Leininger* v. *Stearns-Roger Manufacturing Co.*, 17 Utah 2d 37, 404 P. 2d 33. Likening the role played by the United States in the construction of the bridge to that of an independent contractor, the court of appeals held that under *Leininger* the United States could not be held liable "for any accident which resulted from the design and construction of the approach roads since Utah designed and located the bridge and Utah subsequently accepted and agreed to maintain the bridge and approach roads" (Pet. App. A-10).

Finally, the court held that, in any event, the United States could not be held liable because its assistance to the State in constructing the bridge and approach roads was a discretionary function to which the Federal Tort Claims Act does not apply (Pet. App. A-10 to A-13).

DISCUSSION

We principally rely on the court of appeals' opinion. Each of the three grounds given by the court of appeals independently establishes that the United States is not liable for the accident. The court's desision does not conflict with any other case, and there is no reason for review by this Court.

1. The court of appeals scrupulously observed the requirement of Fed. R. Civ. P. 52(a) that findings of fact will not be overturned on appeal unless they are clearly erroneous (Pet. App. A-4). The court viewed the evidence, and all reasonable inferences that could be drawn from it, in the light most favorable to petitioners (*ibid.*). It held simply that the district court's findings were clearly erroneous. Its decision in this regard is based on uncontradicted evidence that Utah exercised the ultimate responsibility for the design, construction and location of the bridge (*id.* at A-5 to A-7); that the location of the approach roads was dictated by the placement of the bridge (*id.* at A-8); and that the design and construction of the approach roads met applicable federal standards (*ibid.*). The court of appeals thus correctly concluded that the district court's finding that the United States was negligent in the design or construction of the bridge or approach roads was clearly erroneous. In any event, petitioners' contention that the court of appeals erred on this issue turns solely on the facts involved in this case, and it presents no disputed legal issue appropriate for this Court's review.

2. Under the Federal Tort Claims Act, the United States is liable for its negligent acts only to the extent a private person would be liable under the law of the place where the negligent act or omission occurred. 28 U.S.C. 1346(b); *Richards* v. *United States*, 369 U.S. 1. In

Leininger v. *Stearns-Roger Manufacturing Co., supra,* the Supreme Court of Utah held that an independent contractor whose work was accepted by his employer is not liable for injuries caused by fulfillment of plans, specifications and directions given to him by the employer, unless the plans were "so obviously dangerous that no reasonable man would follow them." 17 Utah 2d at 41, 404 P. 2d at 36. The United States played the role of an independent contractor here, as the court of appeals held (Pet. App. A-8, A-10), and consequently it cannot be liable.

Petitioners do not challenge the general applicability of the *Leininger* rule, except to note that each case must be decided on its facts and that the district court held that the case fell outside the accepted rule (Pet. 12). Their argument is that when "such a determination is made on the law of his State by a resident federal trial judge, his views are persuasive and are ordinarily accepted" (*ibid.*). But there is no dispute here about the meaning of state law; the dispute concerns only the application of that law to these facts. This Court's review of that factual dispute is not warranted. Cf. *Bishop* v. *Wood*, 426 U.S. 341, 346.

3. The court of appeals' holding (Pet. App. A-10 to A-13) that petitioners' claim against the the United States is barred by the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a), offers a third independent ground for its judgment. Petitioners, who argue that the discretionary function rule applies only to "planning-level policy decisions" (Pet. 10), interpret the statute too narrowly. *Dalehite* v. *United States*, 346 U.S. 15, 35-36, held that the discretionary function exception applies not only to the "initiation of programs and activities," but also to "determinations made by executives or administrators in establishing plans, specifications or schedules of operations." The Court declared that

"[w]here there is room for policy judgment and decision there is discretion," and that "[i]t necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." 346 U.S. at 36. Because petitioners do not dispute that the decision to assist Utah in construction of the project fits within the discretionary function exception (Pet. 10), it follows that any determination relating to the "plans, specifications or schedules of operations" through which that decision was implemented is also within the exception.

At all events, the evidence demonstrates that the activities of the United States were the product of a "planning-level policy decision." The United States accepted Utah's invitation to assist in the construction of the McElmo Creek project pursuant to 23 U.S.C. 208 (see Pet. App. A-11), which expresses a congressional policy that the federal government cooperate with the states in building bridges and roads on Indian reservations. The federal government decided to accept the State's designs for the bridge, but to substitute, with the State's approval, federal designs for the approach roads. Those plans called for a bridge and road that would withstand a flood likely to occur once every 25 years. The decision to build a project which would provide that amount of safety (rather than a safer, but more expensive, project) was made at the policy level (Pet. App. A-12 to A-13).[4] Since petitioners'

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[4]Petitioners contend (Pet. 10) that the decision to build the diversionary dike, which was intended to protect the bridge in flood situations, was not a "policy level" decision because it was made on the project site by the supervisory federal engineer. But the decision to construct the dike, and how to construct it, called on the judgment of the supervisory engineer to carry out the "policy level" decision to help in the bridge and road project, and thus it falls within the discretionary function exception. *Dalehite* v. *United States, supra;*

claim is that the federal government was negligent in not designing the bridge to withstand a greater flood (Pet. 8-9), the court of appeals was correct in concluding that the discretionary function exception barred petitioners' action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Irzyk v. *United States*, 412 F. 2d 749 (C.A. 10); *Valley Cattle Co.* v. *United States*, 258 F. Supp. 12 (D. Hawaii); *United States* v. *Ure*, 225 F. 2d 709 (C.A. 9).

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